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No. 08-950

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In The

Supreme Court of the United States

CRAIG MATTHEW FREDERICKSON,

Petitioner,

v.

DAVID D. COOP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, in determining the length of time a debtor must maintain his chapter 13 case, the Eighth Circuit Court of Appeals correctly held that the debtor's "disposable income" as defined in section 1325(b)(1)(B) is merely the "starting point" for determining the minimal amount which must be paid to the general unsecured creditors.

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STATUTES AND REGULATIONS:

11 U.S.C. § 707(b)(2) 3

11 U.S.C. § 1325(b) 2, 3

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 539 F.3d 237. The decision of the Bankruptcy Appellate Panel, is reported at 375 B.R. 829. The Order of the bankruptcy court is reported at 368 B.R. 825. Each of these decisions are appended to the petition before this Court.

JURISDICTION

Petitioner invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), by the filing of his Petition for Writ of Certiorari on January 23, 2009, and that petition was docketed on January 28, 2009. The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to 28 U.S.C. § 158(d), and its decision was entered on October 27, 2008.

STATUTORY PROVISIONS INVOLVED

Section 1325 of the United States Bankruptcy Code is set forth in its entirety in the petition.

STATEMENT OF THE CASE

I. The Statutory Scheme

A. Disposable Income

In contrast to a chapter 7 liquidation case, in a chapter 13 case, the debtor formulates a plan to repay debts. The plan must allocate a sum certain to be paid to the Trustee and apportion those funds to the particular obligations: the mortgage, arrears on the mortgage, other secured debts and any "priority" obligations, usually the taxing authorities. The plan must also address payments to the general unsecured creditors. If the Trustee objects to the plan, the debtor is required to pay all "projected disposable income" into the plan, 11 U.S.C. § 1325(b), for the benefit of the creditors. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), projected disposable income was initially determined by the simple subtraction of the debtor's reasonable expenses from income. These figures appeared on Schedules I and J, the Official Bankruptcy Forms of the debtor's itemization of current income and expenses, respectively.

Due to perceived abuses in the system, Congress deliberately and specifically reduced the discretion afforded the debtors, courts, and trustees in determining what minimal amount above-median debtors were obliged to pay their creditors. This was effected by altering the method by which disposable income is determined – at least for above-median debtors. In

addition, Congress extended the durational requirement for above-median debtors to five years. Amended section 1325(b) differentiates between debtors whose income level is above the median income level in their state of residence from those debtors whose income is below the median. For debtors whose income is below-median, the method of determining disposable income is still to look to Schedules I and J; the debtor's reasonable expenses are subtracted from their income and, as under pre-BAPCPA law, there is a number which constitutes disposable income and, thus, the appropriate amount of the plan payment.

If the debtor is "above-median," the statute directs the calculator to paragraph (b)(3) which defines "amounts reasonably necessary to be expended," by reference to section 707(b)(2)(A), (B), the chapter 7 "means test." To aid in the calculatory gymnastics required by BAPCPA, Official Form 22C has been developed for chapter 13 debtors. The separate parts aid in calculating monthly income. Many of the calculations are mechanical and based upon figures provided by Internal Revenue Service tables and, in some jurisdictions, policies. There is some room for maneuvering and some discretionary allowances, such as child support payments and charitable contributions, but overall, Congress has provided a budgetary frame-work for determining the minimum amount that above-median debtors are to pay to their general unsecured creditors.

At the conclusion of the Form 22C appears the calculated disposable income. The debtor is obligated to provide in his plan for payment of at least this sum to the general unsecured creditors. *See generally In re Lasowski*, 384 B.R. 205, 213 (BAP 8th Cir. 2008).

B. The Applicable Commitment Period

In addition to the requirement that the debtor pay disposable income, section 1325 requires debtors to maintain their chapter 13 case for a minimal term. Below-median debtors are required to make thirty-six months of plan payments to the Trustee; above-median debtors are required to stay in bankruptcy for sixty months. 11 U.S.C. § 1325(b)(4). The only exception is if the plan provides for a 100% dividend to the creditors.

II. The Facts of *Frederickson*

Craig Frederickson's Form 22C indicated that he was an above-median debtor, but at the conclusion of the form, after the allowed expenses were subtracted, the disposable income figure was a negative. Thus, he had no disposable income dividend requirement payable to the general unsecured creditors. The Trustee did not object to any of the claims of deductions and did not dispute the negative figure. The Trustee objected to the confirmation of the proposed plan, however, because the debtor proposed a plan length of only forty-eight months, not sixty. The Trustee calculated that, although the debtor was not

required to propose a specific amount to be paid to his general unsecured creditors, in light of the plan payment proposed in the plan, by lengthening the plan to sixty months, the general unsecured creditors would receive a 100% dividend.

III. The Arguments and Decisions Below

The parties both asserted that BAPCPA required that the debtor's disposable income be determined as outlined above. The Bankruptcy Court agreed, holding that the terms of the statute controlled such that disposable income was determined solely pursuant to the calculations performed on the Form 22C. The Bankruptcy Court then determined that since the disposable income figure on the Form 22C was negative, there existed no "applicable commitment period" and the debtor could maintain whatever plan length he desired. The Trustee appealed this decision and the Bankruptcy Appellate Panel affirmed in all respects.

The Court of Appeals for the Eighth Circuit, although not presented with any dispute regarding the calculation of disposable income, reversed as to the determination of disposable income, holding that the disposable income figure derived from the Form 22C was merely the "starting point" in determining the calculation of a debtor's "projected disposable income." The Court also reversed the Appellate Panel's decision regarding the applicable commitment

period: an above-median debtor is require to maintain a chapter 13 plan for a period of five years despite the fact that there is no specific disposable income dividend requirement.

RESPONSE TO THE PETITION

The petition presents to the Court the most fundamental and divisive issue in chapter 13 cases following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Determination of a debtor's "disposable income" and "projected disposable income." Three circuit courts of appeal have issued decisions. The Ninth Circuit Court of Appeals, *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008), applied a strict standard under the statute, while the Eighth and Tenth Circuit Courts of Appeals, *Coop v. Frederickson*, 539 F.3d 237 (8th Cir. 2008); *Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2008), have determined that "projected disposable income" requires a different analysis than under the BAPCPA statutory scheme. Although both the Eighth and Tenth Circuit opinions stray from the statutory scheme, the decisions differ as to what presumption and standards apply under their respective schemes. The Petition has set forth vigorous argument and succinct précis of the case authority for granting the application; respondent does not believe that further exposition would aid the Court, but, rather would merely be duplicative. The issue is critically important

in chapter 13 cases; the issue is recurring and divides the courts at every level.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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